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Supreme Court of the United States

OCTOBER TERM, 1899.

No. 356.

The Chesapeake & Ohio Railway Company,

Plaintiff in Error,

VERSUS

The Commonwealth of Kentucky,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

1. A statute requiring railroad companies to furnish separate coaches for white and colored interstate passengers, and to transport such passengers of the two races in separate coaches, is invalid, as being in conflict with the commerce clause of the Constitution.
2. The Kentucky Separate Coach Act, properly construed, is applicable to the transportation of all passengers, whether interstate or intrastate, of the two races.
3. Said Act, if unconstitutional in its application to interstate passengers, can not be held valid for any purpose, but must be held invalid *in toto*.

JOHN T. SHELBY,
For Plaintiff in Error.

H. T. WICKHAM,
Of Counsel.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

SUPREME COURT OF THE UNITED STATES.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

THE COMMONWEALTH OF KENTUCKY, - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This Writ of Error is prosecuted to reverse a judgment of the Court of Appeals of Kentucky, and the question it presents is whether the statute of that State, known as The Separate Coach Act, is unconstitutional, as being an attempt to regulate interstate commerce.

For the convenience of the Court this statute, which will be found in Kentucky Session Acts for 1891, '92, '93, page 63, is here copied in full:

"CHAPTER 40.

"AN ACT to regulate the travel or transportation of the white and colored passengers on the railroads of this State.

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"§ 1. Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches by steam or otherwise, on any railroad line or track

within this State, and all railroad companies, person or persons, doing business in this State, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this State; and all foreign corporations, companies, person or persons, organized under charters granted, or that may be hereafter granted, by any other State, who may be now, or may hereafter be, engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach, within the meaning of this Act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart.

"§ 2. That the railroad companies, person or persons, shall make no difference or discrimination in the quality, convenience, or accommodations in the cars or coaches or partitions set apart for white and colored passengers.

"§ 3. That any railroad company or companies that shall fail, refuse, or neglect to comply with the provisions of Sections 1 and 2 of this Act shall be deemed guilty of a misdemeanor, and, upon indictment and conviction thereof, shall be fined not less than five hundred nor more than one thousand five hundred dollars for each offense.

"§ 4. That all circuit courts in which railroads are operated in this State shall have complete jurisdiction over such offenses.

"§ 5. The conductors or managers on all railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car or coach or compartment, and should any passenger refuse to occupy the car, coach, or compartment to which he or she may be assigned by the conductor or manager, said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such passenger off of the train. And for such refusal and putting off the train neither the manager, conductor, nor railroad company shall be liable for damages in any court.

"§ 6. That any conductor or manager on any railroad who shall fail or refuse to carry out the provisions of Section 5 of this Act, shall, upon conviction, be fined not less than fifty nor more than one hundred dollars for each offense.

"§ 7. The provisions of this Act shall not apply to employes of railroads, or persons employed as nurses, or officers in charge of prisoners.

"Approved May 24, 1892."

This Act will also be found in the publication known as Kentucky Statutes, and constitutes Sections 795–801 of that compilation.

The Chesapeake & Ohio Railway Company, Plaintiff in Error, a corporation foreign to the State of Kentucky and engaged in operating a continuous line of railway from Newport News, Virginia, to Louisville, Kentucky, and all of whose cars passing through Kentucky were, for the purposes of this case, engaged in interstate commerce (R. 8), was indicted in the Circuit Court of Shelby County for failing "to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on its line of railroad" (R. 2); and, being convicted in the Circuit Court, prosecuted an appeal to the Kentucky Court of Appeals, where the judgment of conviction was affirmed.

By demurrer to the indictment (R. 3–4), by a motion for a peremptory instruction at the conclusion of the testimony offered by the Commonwealth upon the trial (R. 11), and by motion in arrest of judgment, made pursuant to Sections 275–6 of the Kentucky Criminal Code of Practice (R. 6), the defendant below raised the question of the validity of the statute; which question was also argued in the Court of Appeals and there passed upon adversely to its contention (R. 19–20). This ruling of the State Court is assigned as error herein (R. 22).

ARGUMENT.

I.

Since the decision in *Hall* v. *DeCuir*, 95 U. S. 485, there can be no doubt that a State statute requiring the separation of interstate passengers of different colors would be a regulation of interstate commerce. In that case the Louisiana statute forbade common carriers to separate, on account of race or color, passengers carried by them while in their charge in that State, and authorized a recovery of exemplary as well as actual damages by any passenger who was thus separated without his or her consent; and the statute having been construed as intended to embrace interstate passengers, this Court held it to be an unconstitutional attempt to regulate interstate commerce, and denied the right of the plaintiff, who had been separated without his consent, to a recovery. The following language from the opinion is very pertinent to the case at bar:

> "But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, can not but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

> "It was to meet just such a case that the commercial clause in the Constitution was adopted. . . . The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce can not flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

The ruling in this case has never been modified or questioned, but, on the contrary, is constantly referred to with approval. Whatever difficulty may have been experienced in determining whether the principles upon which it is based were applicable to other cases arising under the commerce clause of the Constitution, there can be none as to their applicability to a statute either requiring or forbidding the separation by a carrier of interstate passengers. If, then, by the statute under consideration, it was intended to require that all passengers on railroads should, while within the territorial limits of Kentucky, be carried in separate coaches according to color, without reference to whether their journey lay wholly within the State or was partly within and partly without, it comes clearly under the decision in *Hall* v. *DeCuir*.

II.

We are, therefore, brought at once to the question of the proper construction of the Act.

It will be observed that there is no indication either in its title or body that its operation was intended to be confined to passengers whose journeys commence and end within the boundaries of the State. The title reads "An Act to regulate the travel or transportation of the white and colored passengers on the railroads of this State;" and thus, by its very words, manifests a purpose to regulate the travel or transportation on railroads of *all* white and colored passengers, while they are in the State, without reference to where their journey might commence or end. The body of the Act applies in terms to all companies or corporations operating railroads within this State, and to all conductors and managers of trains thus operated; requires the furnishing of separate coaches for *all* white and colored passengers, and makes it mandatory upon all such conductors and managers, under penalty of a fine, to assign to *each* white and colored passenger his or her respective car or compartment. Not only does the Act, therefore, both in its title and in its terms, embrace *all* white and colored passengers carried within the boundaries of the State, without reference to the initial point or the terminus of their journey, but it is manifest that the Legislature would never have imposed so useless a burden upon carriers as to require the separation of only such white and colored passengers as should commence and end their journey within the State. For it will be at once seen that if such separation can be constitutionally required only as to domestic travel, then the carrier can only be compelled to separate the colored intrastate passenger from the white intrastate passenger. He may with impunity carry together intrastate colored and interstate white passengers, or intra-

state white and interstate colored passengers, or interstate white and interstate colored passengers.

The legislation was evidently enacted with the purpose of enforcing one uniform policy of the separation of the two races in public vehicles of transportation within the limits of Kentucky, and to compel, under heavy penalties, not only the furnishing of separate means of transportation, but also the actual use of such separate means; and had it been contemplated that it was not within the power of the State to enforce this policy as to interstate passengers, we submit that it is affirmatively manifest that the policy would not have been adopted as to that portion of the travel which commenced and ended within the State lines. To hold otherwise would be to convict the law-making department of the absurdity of establishing a policy which would not be corrective of the supposed evils, except to a very limited extent, and which could only result in attrition, annoyance, and bad feeling by reason of the senseless, unintelligible distinction which would have to be made between interstate and domestic passengers of the colored race.

It will no doubt be strenuously insisted that this case should be ruled by L., N. O. & T. R. Co. v. State of Mississippi, 133 U. S. 587. A reference to that case will show, however, that this is not so. The question presented was as to the validity of the Separate Coach Act of Mississippi; but there the Supreme Court of the State had construed the statute *as applying solely to domestic commerce.* Referring to Hall v. DeCuir, and differentiating the question as there presented from the form it took in the Mississippi case, this Court said (pages 589 and 591):

> "The Supreme Court of the State of Louisiana held that the Act applied to interstate carriers, and required them, when they came within the limits of the State, to receive colored passengers into the cabin set apart for white persons. This Court, accepting that construction as conclu-

> sive, held that the Act was a regulation of interstate commerce, and, therefore, beyond the power of the State. . . . In this case, the Supreme Court of Mississippi held that the statute applied solely to commerce within the State; and that construction, being the construction of the statute of the State by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a State, and not interfering with commerce between the States, then obviously there is no violation of the commerce clause of the Federal Constitution."

In the case at bar the Court is not restrained in its construction of the Statute by the fact that the Kentucky Court of Appeals has ever construed it as intended to regulate domestic commerce, or, in other words, the transportation of intrastate passengers only. That Court, in its opinion in this case, says nothing on the point expressly; but, on the contrary, by basing its conclusion as to the validity of the Act (R. 20) upon its former decision in Ohio Valley R'y's Rec'r v. Lander, 47 S. W. Rep. 344 and 882, and the late case in this Court of Lake Shore, &c., R. Co. v. State of Ohio, 173 U. S. 285, it impliedly concedes that the Statute was intended to apply to interstate passengers, and was, therefore, to be upheld as a police regulation only incidentally affecting interstate commerce.

A reference to these two last-mentioned cases will make this appear very plainly. In Ohio Valley R'y's Receiver v. Lander, the opinion of the Court, delivered by Judge Guffy, will be found in 47 S. W. Rep. 344, and two separate opinions of Judges Burnam and DuRelle on page 882 of the same volume. It will be seen from all three opinions that almost the only question considered by the Court was the validity of this Act under the Fourteenth Amendment of the Constitution. Judges Burnam and DuRelle consider it wholly from this point of view, and Judge Guffy's opinion is devoted almost exclusively to this point. The only allusion by him to the interstate commerce

question is at the close of the opinion (page 351), where he seems to treat it as one concluded by the decision in L., N. O. & T. R'y v. State of Mississippi, *supra*, and then proceeds to say:

> "If it were conceded (which is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the State, and, therefore, it should be held valid as to such passengers. It seems to us that a passenger taking passage in this State, and railroad companies receiving passengers in this State, are bound to obey the law in respect to this matter so long as they remain within the jurisdiction of the State."

From this quotation it is manifest that the learned Judge, speaking for the Court, did not consider that the statute would be unconstitutional if intended to apply to interstate passengers, and, from the concluding sentence, that it was regarded as applicable to the case of passengers *received* in the State, no matter what their destination. In other words, the Court assumed after its conclusion upon the Fourteenth Amendment question, that the power existed to regulate the transportation of all classes of passengers, so long as they were "within the jurisdiction of the State,"—a position wholly irreconcilable with the rule in Hall v. DeCuir, *supra*, and Wabash, St. L., etc., R'y v. Illinois, 118 U. S. 557.

Turning now to the other case referred to by the Court of Appeals in support of its opinion—Lake Shore, etc., R. Co. v. Ohio—the very citation of it shows that the learned Court regarded the statute in the aspect of a police regulation only incidentally affecting interstate commerce, and, therefore, in the absence of Congressional action, valid, without reference to its applicability to interstate passengers. For in the Ohio case the only subject discussed by this Court was the extent to which police regulations might constitutionally be made to affect what

was conceded to be interstate commerce; and the opinion, expressly recognizing the soundness of the ruling established in Hall v. DeCuir, with regard to either the enforced mingling or separation of interstate passengers, distinguishes the question there presented from the one then under consideration.

It is, therefore, confidently submitted (1) that this Act can be rationally construed only as intended to apply to *all* passengers while being transported within the jurisdictional limits of Kentucky; (2) that this Court is not precluded from adopting this rational construction by any contrary construction given by the highest court of Kentucky; and (3) that so construed it must, under the decision in Hall v. DeCuir and Wabash, St. L., etc., R'y. v. Illinois, *supra*, be pronounced unconstitutional.

III.

If it be contended that, although the State may not have the power to regulate how *interstate* passengers shall be carried, yet, as it has the power to regulate the carriage of *intrastate* passengers, the Act may, therefore, yet be held constitutional in its application to the other class—we submit that the statute can not, as to its constitutional and unconstitutional application, be thus separated by the Court. To do this would be not to construe and enforce the statute, but to make one different from that enacted by the legislative department of the State; it would be to make a statute which was evidently intended by the legislature to apply to all white and colored passengers, when within the limits of the State, apply only to a portion of such passengers, when there is nothing within the act to indicate that it was the legislative intent that it should be made applicable to a portion if it could not be properly applied to all. In support of this contention I ask a consideration of the following decisions:

In the Vriginia Coupon Cases, 114 U. S. 305, the court in holding that the whole act of the Virginia Legislature was un-

constitutional, laid stress upon the fact that the scheme was an indivisible one, not capable of being separated into parts, and that it must, therefore, stand or fall together, and said that those instances where one part of a statute might be enforced as constitutional and another declared to be inoperative and void were cases

> "Where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare *that the intention of the legislature was that the part pronounced valid should be enforcible, even if the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature, one they may never have been willing by itself to enact.*"

So in this case we contend that the statute being unconstitutional as to interstate passengers, and it being evident that the legislature intended the policy embodied in it to apply to both interstate and intrastate passengers, to hold that it is valid as to the one class only would be "to substitute for the law intended by the legislature, one they may never have been willing by itself to enact."

In United States v. Reese, 92 U. S. 214, two inspectors of a municipal election in Kentucky were indicted under a Federal statute which provided in general terms for the punishment of inspectors who should wrongfully refuse to receive the vote of a citizen when presented under certain circumstances, and for the punishment of those who, by unlawful means, hindered or delayed any citizen in doing an act required to be done in order to qualify him to vote, or from voting at any election. There being nothing in the statute to limit its operation to a refusal or hindrance "on account of the race, color, or previous condition of servitude of the voter," it was held to be unconstitutional, because, on its face, it was broad enough to cover wrongful acts without, as well as within, the constitutional power of Congress. An

attempt was made in that case to limit the statute by construction so as to make it applicable only to those acts which Congress might rightfully prohibit and punish, but to this contention the Court replied (page 221):

> "For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. *The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.* It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one."

In the Trade-Mark Cases, 100 U. S. 82, the court said (page 98) that the purpose of the statute there under consideration

> "was to establish a universal system of trade-mark registration for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the residence of the owner, with the solitary exception that those who resided in foreign countries, which extended no such privileges to us, were excluded from them here,"

and it was held that a statute so broad and comprehensive in its terms was not within the constitutional grant of legislative power to Congress. It was suggested, however, that the indictment

there presented a case in which the defendant was charged with having in his possession counterfeits of the trade-marks of foreign manufacturers; and that if Congress had power to regulate trade-marks used in commerce with foreign nations and among the several States, the statute in question might be held valid in that class of cases, even if no further. The Court, however, said as to this suggestion (page 98):

> "While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part when they are distinctly separable, so that each can stand alone; it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

And again (page 99):

> "If we should, in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, viz., to make a trade-mark law which is only partial in its application, and which would complicate the rights which parties would hold in some instances under the act of Congress, and, in others, under the State laws."

It will be observed how singularly pertinent the last quotation is to the question which is involved here, where, in order to hold that the statute under consideration may be constitutionally applied to the case of intrastate passengers and intrastate commerce, the Court would have to make a Separate Coach law "which is only partial in its application."

In Baldwin v. Franks, 120 U. S. 678, Baldwin had been indicted under a Federal statute which provided that if two or more persons in any State or Territory should conspire for the purpose of depriving any person or class of persons of the

equal protection of the law, or of equal privileges or immunities under the law, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the law, they should be punished by fine or imprisonment. The alleged offense was committed by the plaintiff against the Chinese in the State of California, and, being arrested, he applied for his discharge on a writ of *habeas corpus*, upon the ground that the statute in question was not within the legislative power of Congress; the words of the statute being so comprehensive as to include not only cases of conspiracy to deprive persons of their rights under the laws of the United States, but also conspiracies to deprive persons of their rights under any State law as well. It was contended, however, upon the part of the Government, that, although the statute was invalid so far as it applied to conspiracies to deprive persons of the protection to which they were entitled under the laws of the State, it was yet good for the punishment of those who conspired to deprive aliens of the rights guaranteed to them in the State *by the treaties of the United States;* it being within the constitutional power of Congress to punish conspiracies in the last named class of cases. To this argument, however, the Supreme Court replied as follows (page 685):

> "In support of this argument reliance is had on the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a State, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable, so that it can be enforced in a Territory, though

not in a State, is quite another question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens, as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a State, and those who conspire to deprive him of his rights under the constitution, laws or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

We submit that the four cases above referred to are decisive of this point. The Separate Coach Law is certainly as broad, general, and comprehensive in its terms as any of the acts referred to in any of these cases; and it does by its terms embrace just as unequivocally as they did a class of subjects, viz: interstate passenger commerce, which was not within the legislative power of the body which enacted the law. And just as manifestly here, as in them, is the suggestion, that the statute may still be upheld as to the class of subjects to which the legislative body might constitutionally apply its policy, met by the principle that the courts can not undertake to sever statutes which in their purpose and essence are inseverable and designed to establish a uniform system and effectuate a uniform policy. The object which this statute, as we have before said, evidently sought to accomplish was that all passenger traffic within the State of Kentucky, and without reference to whether it originated within or without the State, should be conducted upon the uniform policy of a separation of the two races. For the court to hold that, while this policy can not be constitutionally carried out with reference to interstate passengers, it should yet be applied to intrastate transportation, would be to decide that the legislature intended it to

apply to the limited class, even if it could not apply to all. We submit that there can nowhere be found the evidence of any such intention; that the statute is, therefore, an inseparable one, and must fail by reason of its attempt to extend the legislative power of the State to subjects which are within the legislative power of the United States only.

Each of the foregoing propositions was considered by the Circuit Court of the United States for the District of Kentucky in the case of Anderson v. L. & N. R. R. Co., 62 Fed. Rep. 46, and in the opinion rendered by Judge Barr in that case the conclusions which we have above endeavored to establish were reached. When that opinion was delivered, neither the case at bar nor that of Ohio Valley R'y's Rec'r v. Lander had been decided by the Kentucky Court of Appeals; but as we have endeavored to show, in neither was the statute in question construed as applicable only to the transportation of domestic passengers. The opinion in Anderson v. L. & N. R. R. Co. is referred to as furnishing a clear and satisfactory construction of the statute, and an able and succinct exposition of the law applicable to this case.

I respectfully ask a reversal of the judgment of the Court of Appeals of Kentucky.

JOHN T. SHELBY,
For Plaintiff in Error.

HENRY T. WICKHAM,
Of Counsel.

CITATIONS.

Kentucky Session Acts 1891–'92–'93, page 63;
Hall v. DeCuir, 95 U. S. 485;
Wabash, St. L., etc., R'y v. Illinois, 118 *Id.* 557;
L., N. O. & T. R. Co. v. Mississippi, 133 *Id.* 587;
Ohio Valley R'y's Receiver v. Lander, 47 S. W. Rep. 344 and 882;
Lake Shore, etc., R. Co. v. Ohio, 173 U. S. 285;
Virginia Coupon Cases, 114 *Id.* 305;
U. S. v. Reese, 92 *Id.* 214;
Trade Mark Cases, 100 *Id.* 82;
Baldwin v. Franks, 120 *Id.* 678;
Anderson v. L. & N. R. R. Co., 62 Fed. Rep. 46.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 103.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

Opinion of Court of Appeals of Kentucky in Case of Ohio Val. R'y's Receiver vs. Lander et al.

(COURT OF APPEALS OF KENTUCKY, OCT. 7, 1898.)

OHIO VAL. R'Y'S RECEIVER
vs.
LANDER ET AL.

CONSTITUTIONAL LAW—DISCRIMINATION AGAINST COLORED RACE—SEPARATE-COACH LAW—CONSTRUCTION OF STATUTE SO AS TO UPHOLD IT.

1. Though not authorized or required by statute to do so, railroad companies may make reasonable regulations for the separation of white and colored passengers.
2. Act 1892, known as the "Separate-coach law," requiring railroad companies to assign white and colored passengers to separate coaches, is not in violation of the 14th amendment to the Constitution of the United States.

3. If the statute be a regulation of interstate commerce if applied to interstate passengers, which is not conceded, it will be construed as intended to apply only to transportation within the State.

Appeal from Circuit Court, Christian County.

"To be officially reported."

Action by Robert N. Lander and Fannie E. Lander against John McLeod, receiver of the Ohio Valley railway, to recover damages.

Verdict and judgment for plaintiffs, and defendant appeals. Reversed.

Fairleigh & Straus and Hunter Wood, for appellant.

John Feland & Son, for appellees.

GUFFY, *J.*:

This action was instituted by the plaintiffs, Robert N. Lander and Fannie E. Lander, his wife, against John McLeod, receiver of the Ohio Valley railway. It is alleged in the petition that the plaintiffs are husband and wife, and citizens of Hopkinsville, Ky., and that they are colored people and citizens of the United States. It is further alleged that said railway was in the possession and under the control of said McLeod, as receiver aforesaid, and that said McLeod, through his agents, etc., has been and is operating it as a common carrier, and said railway extends from the city of Evansville, Ind., through the cities of Henderson and Princeton, to Hopkinsville, Ky., and is an interstate carrier of passengers and freight between said points, and is so operated by McLeod, receiver; that on or about the 24th of July, 1895, the plaintiffs pur-

chased from the agent of said McLeod a first-class passenger ticket for the female plaintiff, entitling her to ride on said railway and connecting line from Hopkinsville, by way of Princeton, to Mayfield, Ky., in any first-class coach of any passenger train running between said points, and with said ticket in her possession she boarded the regular passenger train of defendant, which was then about to leave said station, and entered what is usually called the "ladies' coach," and took a seat therein which was not at the time occupied or claimed by any other person, and, while thus seated and waiting for the train to start, the conductor thereof in charge of said train came to her, and, without demanding of her her ticket or making any explanation of his conduct, required her to give up her seat and leave said coach and occupy a seat in the front coach, usually called the "smoker," in a small compartment in front thereof, or get off of the train; that it was very warm weather and the compartment to which she was thus assigned was small and illy ventilated, and that it was unclean and equipped and fitted with accommodations greatly inferior to the ladies' coach from which she was thus ordered by the said conductor, and was occupied by colored passengers of all classes, sexes, and conditions, and persons were allowed to smoke and indulge in other practices, without restraint therein, offensive to ladies and children, and which were not permitted in said ladies' coach; that she refused to give up her said seat and asserted her right as holder of a first-class ticket to remain where she was; that said conductor went into another coach or part of said train, and came back with two or three other men, who were also agents of defendant, and, upon her persisting in retaining her seat,

said conductor took hold of her by the arms and shoved her up from it, and was proceeding by force of arms to remove her from said coach, and plaintiff, in order to avoid a physical struggle with said employés and prevent a breach of the peace, yielded, under protest, to the commands of said conductor, and consented to go into said car rather than give up her trip by being removed from the train, and she was thus compelled to occupy a seat in said car until said train reached Princeton, the end of her journey on that road; that after she had gone into said compartment the conductor demanded of her her ticket, which she gave up to him; that plaintiff, Fannie E. Lander, is a lady of good character and reputation, and that she was not at the time interrupting or in any way disturbing or interfering with anybody, and by this violent and illegal conduct of the conductor and other employés of the defendant, these plaintiffs have been damaged in the sum of $10,000, for which they prayed judgment.

The defendant filed a demurrer to said petition.

The answer of the defendant is as follows: The defendant, for answer to the petition herein, denies that while plaintiff, Fannie E. Lander, was seated in one of its passenger cars and waiting for the train to start, the conductor in charge of this defendant's car came to her and, without demanding her ticket or making any explanation to her of his conduct, required that she should give up her seat and leave said coach or occupy a seat in the front coach, usually called the "smoker," or in a small compartment in the front part thereof, or to get off of the train. He denies that the compartment to which the plaintiff was invited to take a seat was small or illy ventilated, or that it was unclean or un-

fitted or equipped with accommodations greatly or at all inferior to those of the coach in which plaintiff was seated at the time she was requested to go into another coach, or that said compartment was occupied by persons who were unfit to be in said compartment, or indulged in any practice or practices, without restraint therein, offensive to ladies and children, which were not permitted in the coach which plaintiff was invited to leave. He denies that when plaintiff was requested to leave the coach that she was in she refused to give up her said seat or to leave said coach, or that she asserted any right, as the holder of a first-class ticket, to remain where she was when said conductor requested her to leave said coach, and he denies that said conductor went into another coach or a part of the said train, or came back into the coach where plaintiff was with two or three other men or any other men, who were agents or not agents of this defendant, and that, upon her persisting and retaining said seat, the said conductor took hold of her by the arms, or shoved her up from the seat, or was proceeding by force of arms to remove her from said coach, or that plaintiff, in order to avoid a physical struggle with said conductor or persons, or to prevent a breach of the peace, yielded under protest to the commands of the said conductor, or consented under protest to go into said compartment in order to avoid being removed from said train, or to avoid giving up her said trip, or that she was thus compelled or forced to occupy a seat in said compartment until said train reached Princeton, the end of defendant's road. He denies that by reason of any illegal or violent conduct by the conductor in charge of said train or any other employé upon said train the plaintiff was greatly or at all damaged in the sum of $10,000 or

any other sum. The defendant, for further answer, says that the plaintiff bought a ticket at Hopkinsville, Ky., to Mayfield, Ky., and started to board one of defendant's trains at Hopkinsville, Ky., and when she made an effort to board said train the brakeman in charge of said train and under the employment of this defendant was standing at the steps of the coach, where it was his duty to stand, and there informed the plaintiff before she got into any coach to go into the colored coach, the apartment set apart for colored people, as required by the laws of this State. The plaintiff refused to do this, and went to the white coach. The conductor thereupon went into the white coach, and politely informed the plaintiff of the law of this State providing for separate coaches for colored and white passengers, and politely requested her to obey the law and to go into the compartment provided for colored people, and took the plaintiff's basket or baggage and carried it into the colored compartment for her and requested her to go into said car. The plaintiff, without being forced in any way and without any force being used upon her in any way, consented to go into said coach, and did go into said coach. The conductor did not take hold of the plaintiff and did not force her from her seat by any violence whatever, but, after explaining to her about the law and the requirements of the law, the plaintiff voluntarily, in company with her husband, left the white coach and went into the coach provided for the colored people. No insulting language was used by the conductor or any other employé of the train to the plaintiff, and she was not in any way mistreated or offended by any misconduct upon the part of the conductor of said train or any other employé connected with

the operation of said train. The defendant further states that the compartment provided on said train for the colored passengers was in every way as comfortable, as clean, and as free from offensive misconduct on the part of the passengers as the coach provided for first-class white passengers. Said coach was well ventilated and was as well provided and equipped in every respect for the comfort of colored passengers as the coach in which the plaintiff was at the time she was invited to go into the colored compartment. No smoking was allowed in said compartment, and no disorderly conduct or offensive or disorderly characters were permitted to ride in said coach, but the same was as well conducted in every respect and as well policed in every respect as the coach which plaintiff was invited to leave. The defendant says that these separate coaches are provided by virtue of a law passed by the Kentucky legislature, and that he has obeyed said law and requires all of his agents in the operation of his road to obey it, and it is the duty of every passenger, white or black, to obey it, and nothing was done on this occasion except to request the plaintiff to obey the law, which she did, and she was not compelled to do so by any violence used by the conductor or any other agent towards her. Having fully answered, defendant prays to be dismissed and for his costs herein expended.

The reply is a traverse of the affirmative matters of the answer, and the affirmative averments of the reply were, by agreement, controverted of record.

A jury trial resulted in a verdict and judgment in favor of plaintiffs for $125, and, appellant's motion for a new trial having been overruled, he prosecutes this appeal. The grounds relied on for a new trial are: (1) Because the court

erred in giving instruction No. 1 asked for by plaintiff: (2) because the court erred in refusing to give instructions Nos. 2, 3, and 4 asked by appellant; (3) because the verdict is contrary to the law and the evidenee.

The instruction given by the court is as follows: "The court instructs the jury that, under the law and the evidence in this case, the plaintiff had the right to take a seat where she did, in the ladies' coach, and that any attempt on the part of the defendant, his agents or employés, in charge of the train, to make her move into and take a seat in another coach was a violation of law and of her rights; and, if she was required by any conductor or any agent or servant of the defendant so to remove, the jury must find for plaintiffs the damages they have sustained; and in so finding they are not confined to actual damages, but may take into consideration the humiliation and injury to the feelings of the plaintiff, and the nature and condition of the compartment which she was required to occupy, and find in any sum not exceeding the amount claimed in the petition."

The defendant asked the three following instructions, which were refused by the court:

"(1.) If the jury believe from the evidence that the plaintiff got into the ladies' coach in defendant's car at Hopkinsville, Ky., and was invited, in a polite and courteous way, by the conductor of said car, to leave the same, and go into the compartment prepared for colored passengers, and they believe from the evidence, further, that said compartment prepared for colored passengers was substantially as comfortable in all of its appointments as the car from which she was invited to leave, and they further believe from the evidence that the conductor was not guilty of any misconduct

towards the plaintiff, and used no more force than was necessary to compel a compliance with his request, then the law is for the defendant, and the jury should so find.

"(2.) The court instructs the jury that it was the duty of the defendant to provide separate coaches for colored and white passengers, and it was the duty of the defendant, through its agents, officers, or employés, to compel colored passengers and white passengers to occupy the respective compartments prepared for them, and it was the duty of the plaintiff to obey this regulation of the company; and if the jury believe from the evidence that the defendant was in good faith at the time enforcing the regulation, and using no more force than was necessary to compel the plaintiff to conform to this regulation, then the law is for the defendant, and they should so find.

"(3.) The court instructs the jury that, in the event they should find for plaintiff, they can only find compensatory damages—that is, such damages as would actually compensate her for any injury done to her, including any mental anguish or mortification to her feelings resulting by reason of the conduct of defendant's agents and employés in compelling her to leave the ladies' coach and go into the colored compartment."

It will be readily conceded that it was the duty of the appellant to furnish the appellee a seat in a coach as good and comfortable as the others used, or set apart for the accaccommodation of first-class white passengers, and also that appellant would not be justifiable in using unnecessary force in requiring plaintiff to occupy the coach set apart for colored passengers; and, while there is some conflict in the proof in this respect, the chief, if not

the sole, question discussed in the briefs on file is the constitutionality or validity of an act of the legislature of 1892, commonly called "the separate-coach bill." It is, however, suggested by appellant that in the absence of any statutory enactment the appellant company had the right to adopt and enforce rules and regulations requiring colored persons and white persons to occupy separate coaches.

The supreme court of North Carolina in Britton *vs.* Railway Co., 88 N. C., 542, used the following language: "Equally well settled does it seem to be, both upon principle and authority, that among those reasonable regulations which they have a right to adopt is the one of classifying their passengers and assigning them to separate, though not unequal, accommodations. This right, as regards the separation of the white and colored races in public places, has been expressly and fully recognized in many of the courts, both State and national [quoting Railroad Co. *vs.* Miles, 55 Pa. St., 209; Day *vs.* Owen, 5 Mich., 520; Hall *vs.* De Cuir, 95 U. S., 485]. In some of the cases it is said to be not barely a right appertaining to the carrier, but a positive duty, whenever its exercise may be necessary in order to prevent contacts or collisions arising from natural or well-known antipathies, such as are likely to lead to disturbances from promiscuous intermingling."

The supreme court of Illinois in Railway Co. *vs.* Williams, 55 Ill., 187, said: "It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers traveling on their line of road. It is not only their right, but their duty, to make such rules and regulations. It is alike the interest of the companies and the public that such rules should be estab-

lished and enforced, and ample authority is conferred by law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers."

In discussing the question under consideration the supreme court of Tennessee, in Railroad Co. *vs.* Wells, 85 Tenn., 615, 4 S. W., 5, said: "We know of no rule that requires railroad companies to yield to the disposition of passengers to arbitrarily determine as to the coach in which they take passage."

The case of Day *vs.* Owen, reported in 5 Mich., 525, was an action to recover damages against a defendant because of his refusal to allow Day, a colored man, to take cabin passage in defendant's boat from Detroit to Toledo. One of the defenses interposed was that by the regulations and established course of the business of the steamboat men, colored persons were not received as cabin passengers and were not allowed to use the cabin as such passengers, and said regulation and course of business was averred to be reasonable. The court in that case said:

"The refusal to allow plaintiff the privilege of the cabin, on his tendering cabin fare, was nothing more or less than denying him certain accommodations while being transported, from which he was excluded by the rules and regulations of the boat. The rules and regulations must be reasonable, and, to be so, they should have for their object the accommodation of the passengers. * * * As the duty of carriers is imposed by law for the convenience of the community at large, and not of individuals, except so far as they are a component part of the community, the law would defeat its own object if it required the carrier, for the

accommodation of particular individuals, to incommode the community at large."

The same principle is announced in Railroad Co. *vs.* Miles, 55 Pa. St., 209. To the same effect is the decision of Com. *vs.* Power, 7 Metc. (Mass.), 596.

In Murphy *vs.* Railroad Co., 23 Fed., 637, Judge Key, in his charge to the jury, said: "Again, I believe that, where the races are numerous, a railroad may set apart certain cars to be occupied by white people, and certain other cars to be occupied by colored people, so as to avoid complaint and friction; but, if the railroad charge the same fare to each race, it must furnish 'substantially like and equal accommodations." It, however, appears in the case *supra* that the railroad did not furnish equal accommodations, and the colored man was allowed to recover.

In the United States district court of Maryland, in the case of McGuinn *vs.* Forbes, 37 Fed., 639, the syllabus of the decision reads as follows: "Plaintiff, an educated colored clergyman, the holder of a first-class ticket on defendant's steamboat, when the supper bell rang seated himself at the table; and on the captain requesting him to move to another table, because the other passengers had complained of his presence, he refused. The captain then had another table fixed up for the other passengers, and plaintiff was left alone, his supper being furnished him. Held, that there was no discrimination against plaintiff on which to base a libel for damages against the owner of the boat."

It was said in the case of Houck *vs.* Railway Co., in the United States circuit court for Texas, reported in 38 Fed., 226, in substance, that a railway company, in the management of its complicated interests, may be authorized in law,

on showing a proper or sufficient state of facts to establish, in the opinion of the court, the reasonableness of the rule, in setting apart one or more of its cars for the use exclusively of colored passengers, and a like number, more or less, as the services may require, for the use exclusively of white passengers; but whenever the company enforces such rule, the company is charged with the duty of furnishing to colored people who pay first-class fare cars to ride in that are as safe and comfortable in their conditions and appointments as the cars furnished to white passengers who pay first-class fare.

It will be seen from the authorities cited that the appellant was authorized to establish a rule requiring white passengers and colored passengers to occupy separate coaches; and whether the law relied on by appellant is constitutional or not, yet if it did adopt the requirements of the law as a rule, and the rule was reasonable, all passengers were legally bound to abide by the rule; and it may be safely assumed that such a rule in this State is a reasonable rule, and is not unjust, either to the white or colored people.

The important question presented for decision is whether or not the Kentucky statute requiring separate coaches or compartments for white and colored passengers is in violation of the Constitution of the United States or of this State. The statute in question is embraced in sections 795–801, inclusive, of the Kentucky statutes. The assumption by some colored persons and by some of the white race to the effect that the statute implies or assumes that the colored race is an inferior race is not well founded. It is well known that a large portion of the white race is opposed to being required to occupy the same seat or to travel in the same

coaches that are occupied by the colored race, and it is wholly immaterial whether the colored race shares the same feeling in that regard towards the white race or not, but the presumption is that many of them likewise prefer to occupy seats in coaches not occupied by white persons. But, whether this be true or not, it is manifestly better for the colored race to be separated from the white race than to be placed in the same coach with white persons, with the result that the same would be offensive to the white race; for, if this be true, it would reasonably cause disturbances, which would be alike disagreeable and injurious to both races. It seems to us that the law complained of is more necessary for the comfort, convenience, and protection of the colored race than of the white race; and it is to be regretted that the law has not been accepted by both races as designed and intended for the mutual benefit, convenience, and protection of both races. So far as we are advised, the constitutionality of the statute in question has not been directly passed on by this court, but its validity has been recognized in several decisions of this court.

In the case of Quinn *vs.* Railroad Co., 32 S. W., 742, the court had under consideration the claim of appellant, who was a colored lady, for damages against the appellee, based upon the allegation that the appellee permitted a white person to go in and remain in the car assigned to colored passengers, and which was occupied by her, and while such person was permitted to remain there he used obscene and profane language, thus humiliating and injuring appellant. This court held that she had a cause of action, and reversed the judgment of the lower court on account of error of instructions, the instructions not being sufficiently explicit as to the right of

the party to recover. In Louisville & N. R. Co. *vs.* Com. (Ky.), 37 S. W., 79, the court again recognized the validity of the law, and to the same effect is the case of Bailey *vs.* Railroad Co. (Ky.), 44 S. W., 105. It seems clear, therefore, that this court has heretofore regarded the statute as valid, and, upon due deliberation, we are of the opinion now that the statute in question is not in conflict with the Constitution of the United States, nor with the constitution of this State, and we are not aware of any decision of the Supreme Court of the United States that holds the statute in question to be invalid.

The statute of Mississippi of March 2, 1888, required all railroads carrying passengers in that State to provide equal and separate accommodations to the white and colored races. It also provided that all railroad companies that shall refuse or neglect within 60 days after the approval of the act to comply with the requirements should be deemed guilty of a misdemeanor, and, upon conviction, fined not more than $500. The Louisville, New Orleans and Texas Railway Company was indicted and fined in the court of Mississippi for failure to comply with the law in question, and, the judgment of the lower court having been affirmed by the supreme court of Mississippi, appellant appealed to the Supreme Court of the United States, which court affirmed the judgment of the Mississippi court. In discussing the question, the court said (Louisville, N. O. & T. R'y Co. *vs.* Mississippi, 133 U. S., 587; 10 Sup. Ct., 348): "So far as the first section is concerned (and it is with that alone we have to do), its provisions are fully complied with when to trains within the State is attached a separate car for colored passengers. This may

cause an extra expense to the railroad company: but not more so than State statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State. No question arises, under this section, as to the power of the State to separate in different compartments interstate passengers, or to affect in any manner the privileges and rights of such passengers. All that we can consider is whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That, affecting only commerce within the State, is no invasion of the powers given to Congress by the commerce clause. In the case of Wabash, St. L. & P. R'y Co. *vs.* Illinois, 118 U. S., 557; 7 Sup. Ct., 4, Mr. Justice Miller, speaking for the court, said: 'If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begin and end within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among

the States. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State which is not subject to the constitutional provision; and the distinction between commerce among the States and the other class of commerce, between the citizens of a single State and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other [quoting The Daniel Ball, 10 Wall., 557; Hall *vs.* De Cuir, 95 U. S., 485; Telegraph Co. *vs.* Texas, 105 U. S., 460].' The statute in this case, as settled by the supreme court of the State of Mississippi, affects only such commerce within the State, and comes, therefore, within the principles thus laid down. It comes also within the opinion of this court in the case of Stone *vs.* Trust Co., 116 U. S. 307; 6 Sup. Ct., 334, 388, 1191."

It will be seen that the appellee in the case at bar purchased a ticket from Hopkinsville to Mayfield, the entire trip being within the State of Kentucky; and, moreover, it appears that she would leave the appellant's road at Princeton, Ky., and there board another train for Mayfield, her destination. It therefore seems clear to us that the decision of the supreme court, *supra*, is conclusive of the constitutionality of the act in question, so far as appellees in this case are concerned. It is true that the appellant railroad extends to Evansville, in the State of Indiana, but that fact can in no wise render the statute in question invalid as to the duty of the railroad to respect and enforce the statute in question.

We have also been referred to the case of Plessy *vs.* Fergu-

son, decided by the Supreme Court of the United States, May, 1896, reported in 163 U. S., 537; 16 Sup. Ct., 1138. We quote as follows from the opinion of the court in that case: "This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races (Acts 1890, No. 111, p. 152). The first section of the statute enacts 'that all railway companies carrying passengers in their coaches in this State shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons shall be admitted to occupy seats in coaches, other than the ones assigned to them on account of the race they belong to.' By the second section it was enacted 'that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State.' The third section provides penal-

ties for the refusal or neglect of the officers, directors, conductors, and employés of railway companies to comply with the act, with a proviso that 'nothing in this act shall be construed as applying to nurses attending children of the other race.' The fourth section is immaterial. The information filed in the criminal district court charged, in substance, that Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred. The petition for the writ of prohibition averred that petitioner was seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach, and take a seat in another, assigned to persons of the colored race; and, having refused to comply with such demand, he was forcibly ejected, with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act. The constitutionality of this act is attacked upon the ground that it conflicts both with the thirteenth amendment of the Constitution, abolishing slavery, and the fourteenth amendment, which prohibits certain restrictive legislation on the part of the States. That it does not conflict with the thirteenth amendment, which abolished slavery and involuntary servi-

tude except as a punishment for crime, is too clear for argument. * * * By the fourteenth amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the State wherein they reside; and the States are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws. The proper construction of this amendment was first called to the attention of this court in Slaughter-house cases, 16 Wall., 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said, generally, that its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States. The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law; but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within

the competency of the State legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power, even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. * * * It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property, in the same sense that a right of action or of inheritance is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called 'property.' Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man. In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the State legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street

is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. * * * So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes, or even requires, the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of State legislatures. We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the State legislature, and should enact

a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in People *vs.* Gallagher, 93 N. Y., 438, 448: 'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon which they are designed to operate. When the Government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some

holding that any visible admixture of black blood stamps the person as belonging to the colored race (State *vs.* Chavers, 50 N. C., 11); others that it depends upon the preponderance of blood (Gray *vs.* State, 4 Ohio, 354; Monroe *vs.* Collins, 17 Ohio St., 665); and still others that the preponderance of white blood must only be in the proportion of three-fourths (People *vs.* Dean, 14 Mich., 406; Jones *vs.* Com., 80 Va., 538). But these are questions to be determined under the laws of each State, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race. The judgment of the court below is therefore affirmed."

It seems to us that the foregoing decision conclusively settles that it was the duty of the appellant to assign to the appellee a coach separate from a coach set apart for white persons. It may be true that the railroad under consideration in the case *supra* commenced and ended in the State of Louisiana, but we do not think that the court was at all governed in its conclusion by that fact.

It is insisted for appellee that the act under consideration undertakes to regulate or control as to interstate passengers, and that that portion of the statute is invalid, as being in conflict with the interstate-commerce clause of the United States Constitution, and that the act is inseparable, and therefore it must all be held invalid. We do not think that such contention is tenable. It seems to us that such contention is in conflict with the decision, hereinbefore referred to, of the Supreme Court of the United States in the case of Louisville, N. O. & T. R'y Co. *vs.* Mississippi, 133 U. S., 587; 10

Sup. Ct., 348, and also in conflict with the well-settled rules of construction. If it were conceded (which is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the State, and therefore it should be held valid as to such passengers. It seems to us that a passenger taking passage in this State and railroad companies receiving passengers in this State are bound to obey the law in respect to this matter so long as they remain within the jurisdiction of the State.

It results from the foregoing that the court erred in giving instruction No. 1, and also erred in refusing the instructions asked for by appellant. Judgment appealed from is therefore reversed and cause remanded for a new trial, upon principles consistent with this opinion.